

E-FILED on 3/9/06

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

STEPHEN ABEL,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant.

No. C-04-03961 RMW

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

[Re Docket Nos. 15, 25, 37]

Plaintiff Stephen Abel ("Abel") has sued defendant International Business Machines Corporation ("IBM") for breach of contract. IBM moves for summary judgment. Abel opposes the motion. Abel has moved to modify the Case Management Order or extend the discovery cut-off. IBM opposes the motion. The court heard oral argument on February 10, 2006. At the hearing, the court tentatively granted IBM's motion for summary judgment and granted in part and denied in part Abel's motion. The court ordered the parties to make further submissions. They have now done so. After considering these submissions, in addition to the moving and responding papers and counsels' arguments, the court grants IBM's motion.

## I. BACKGROUND

Abel worked at IBM as a project manager and systems administrator for twenty-eight years. Abel Decl. Supp. Opp. Mot. Sum. J. ("Abel Decl.") ¶ 3. In March 2001, he proposed a plan for a "guaranteed bridge to retirement" to his manager, Paul Hafner ("Hafner"). *Id.* at ¶ 4. Under the plan, Abel would take an unpaid leave of absence until November 2003 — when his retirement benefits would vest — in return for a promise that IBM would not terminate his employment. Abel claims that Hafner then "assured [him] that the bridge to retirement would work, but it had to be done with the standard IBM Leave of Absence Form." *Id.* at ¶ 7.

On March 15, 2001 Hafner e-mailed Abel this Form. It stated that Abel's "request for a Personal Leave of Absence Work Option has been approved" and that his leave "will begin on March 31, 2001 and . . . end on March 29, 2002." Hafner Decl. Ex. A. It also provided that (1) Abel's leave "may end earlier" because of "business conditions," which "could mean a return to regular employment" and (2) IBM "may, to the extent permitted by law, terminate your leave status and your employment." *Id.* On March 29, 2001 Hafner sent Abel a letter "re-confirming" these terms. *See* Hafner Decl. Ex. B.

Abel contends that he spoke to Hafner after receiving the Forms. Abel Decl. ¶ 7. Abel asserts that Hafner called his plan "a sure thing" and promised to place a letter in his personnel file "so that any new manager would be aware of our agreement to bridge your retirement." *Id.* at ¶ 8.<sup>1</sup> Hafner allegedly reinforced Abel's impression that IBM would extend his leave of absence until November 2003 by stating "have a nice retirement." *Id.* at ¶ 10. In addition, Abel claims that James

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<sup>1</sup> Hafner disputes that he ever "ma[d]e such an agreement." Hafner Decl. Supp. Mot. Sum. J. ¶¶ 8, 9. IBM also objects that Abel's recollection of what Hafner said is inadmissible hearsay. The court disagrees. Hafner's promise to place a letter in Abel's employment file falls within two exceptions to the hearsay bar. It is a statement of intent under Fed. R. Evid. 803(3) and a "statement . . . offered against a party and . . . [made] by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" under Fed. R. Evid. 801(d)(2)(D).

1 Chapdelaine ("Chapdelaine"), Hafner's supervisor, said "[c]ongratulations and [g]ood [l]uck with  
2 your retirement." *Id.* at ¶ 16.<sup>2</sup>

3 Abel believed that he "had to call every year to extend [his] bridge to retirement." *Id.* at ¶  
4 11. In March 2002, he asked his new manager, Paul Mowry ("Mowry") to extend his leave. Mowry  
5 Decl. Supp. Mot. Sum. J. ("Mowry Decl.") ¶ 3. According to Mowry, Abel stated that "he was  
6 hoping to extend his leave of absence until he was eligible for retirement." *Id.* at ¶ 5. Mowry  
7 contends that he explained to Abel that "he would receive an extension for only one year, and that he  
8 would have to reapply for another extension at the end of that year if he wished to remain on leave."  
9 *Id.*

10 On March 14, 2002 Mowry e-mailed Abel a letter approving his leave of absence through  
11 March 12, 2003. Mowry Decl. Ex. A. The letter states that "[d]ue to business conditions, your leave  
12 may end earlier," which "could mean a return to regular employment." *Id.* In addition, it provides  
13 that "[t]he terms and conditions stated in the letter you received at the start of your leave apply  
14 through your new leave end date, except to the extent they conflict with the provisions stated  
15 above." *Id.* In June 2002, IBM reduced its workforce and fired Abel. Chapdelaine Decl. ¶ 11.

16 On February 11, 2005 the court held a Case Management Conference. Abel's counsel did not  
17 appear. The Case Management Order set a fact discovery cut-off of December 1, 2005. Lawson  
18 Decl. Supp. Opp. Mot. Disc. ("Lawson Decl.") ¶ 2. On November 15, 2005 Abel's counsel served a  
19 request for production of documents on IBM. Perez Decl. Supp. Mot. Disc. ("Perez Decl.") Ex. A.  
20 Abel's counsel sought, *inter alia*, Abel's employment file. *Id.* On December 2, 2005 IBM's counsel  
21 wrote to Abel's counsel and informed him that because Federal Rule of Civil Procedure 34 entitles a  
22 party to thirty days to produce documents, Abel's request was untimely. Lawson Decl. Ex. B. On  
23 December 5, Abel's counsel informed IBM's counsel that (1) he had mis-calendared the fact  
24 discovery deadline and (2) would file an *ex parte* motion unless IBM would stipulate to an  
25 extension. Lawson Decl. Ex. C. That same day, IBM's counsel refused. Lawson Decl. Ex. D. On  
26 December 9, IBM's counsel wrote to Abel's counsel and expressed concern that he was waiting to

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27 <sup>2</sup> According to Chapdelaine, he only said "[c]ongratulations on your leave."  
28 Chapdelaine Decl. Supp. Mot. Sum. J. ¶ 5.

1 file his *ex parte* motion until after the December 16 deadline for summary judgment motions, thus  
 2 giving him a roadmap to IBM's legal theories. Lawson Decl. Ex. E. On December 16, IBM filed its  
 3 summary judgment motion. On December 21, Abel filed an *ex parte* request to extend the discovery  
 4 deadline.<sup>3</sup>

## 5 II. ANALYSIS

### 6 A. Abel's Breach of Contract Cause of Action

7 At the February 10 hearing, the court tentatively granted IBM's motion for summary  
 8 judgment. The sections below explain why.

#### 9 1. Summary Judgment Standard

10 Summary judgment is proper when there are no genuine issues as to any material fact and the  
 11 movant is entitled judgment as a matter of law. *See* Fed. R. Civ. 56; *Celotex Corp. v. Catrett*, 477  
 12 U.S. 317, 322-23 (1986). This court must regard as true the non-moving party's evidence, if  
 13 supported by affidavits or other evidentiary material. *Id.* at 324. Where the moving party does not  
 14 bear the burden of proof on an issue at trial, it may discharge its burden of showing that no genuine  
 15 issue of material fact remains by demonstrating that "there is an absence of evidence to support the  
 16 nonmoving party's case." *Id.* at 325. If the moving party shows an absence of evidence to support  
 17 the non-moving party's case, the burden then shifts to the opposing party to produce "specific  
 18 evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan*  
 19 *v. NME Hospitals, Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991).

#### 20 2. The Statute of Frauds

21 The statute of frauds dooms Abel's breach of contract claim. "[A]n agreement that by its  
 22 terms is not to be performed within a year from the making thereof" is invalid unless it is "in writing  
 23 and subscribed by the party to be charged or by the party's agent." Cal. Civ. Code § 1624(a)(1).  
 24 Abel seeks damages for IBM's alleged breach of an oral agreement made in March 2001 not to fire  
 25 him until November 2003. Neither party could have discharged its obligations until November  
 26

27  
 28 <sup>3</sup> Abel also filed an *ex parte* motion to shorten time for hearing on his discovery  
 motion, which the court grants.

2003: more than one year after March 2001.<sup>4</sup> Because the alleged contract was not in writing and could not have been performed within one year of its making, it violates the statute of frauds. *See Pfeifer v. U.S. Shoe Corp.*, 676 F. Supp. 969, 975 (C.D. Cal. 1987) ("alleged oral agreement to employ [fifty-five year-old plaintiff] to the age of sixty-five is an agreement to employ to a fixed date more than one year in the future . . . and therefore, is barred by the statute of frauds").

Abel correctly notes that, under California law, "if a contract provides an option to terminate that *could* arise within a year, the statute of frauds does not apply." Opp. Mot. Sum. J. at 2:22-24 (emphasis in original). Abel also notes that the Leave of Absence Forms states that his leave may end earlier and that IBM may fire him. *See* Hafner Decl. Exs. A, B; Mowry Decl. Ex. A. According to Abel, because it was theoretically possible for IBM to terminate his leave and employment within a year after the parties agreed to the Leave of Absence Form, "the [s]tatute of [f]rauds simply does not apply to this agreement." Opp. Mot. Sum. J. at 3:16-20.

This argument lacks merit. For one, the issue of whether the Leave of Absence Form contained a contingency that could have ended the contractual relationship less than one year after its inception is irrelevant. Abel does not seek damages for breach of that agreement. Instead, he contends that IBM breached a different contract: an oral agreement not to fire him for two years and eight months. *See* Abel Decl. ¶ 15 ("[w]hen I accepted the unpaid leave of absence as a bridge to retirement, it was my understanding from Paul Hafner that I would not be terminated from my employment and that I would have a bridge to retirement"); Opp. Mot. Sum. J. at 4:2-3 (characterizing Hafner, Mowry, and Chadelaine's statements as an "oral side agreement"). By its terms, this agreement cannot be performed within one year and thus violates the statute of frauds. Moreover, even if Abel were correct, and the Leave of Absence Form somehow made performance possible within one year, then Abel cannot explain how IBM violated the terms of any contract. Indeed, to circumvent the statute of frauds, Abel would be relying on provisions that expressly authorize IBM to fire him at any time: the very step that he alleges breached the contract.

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<sup>4</sup> The same is true even if the court construes Mowry's renewal of Abel's leave in March 2002 as somehow constituting a new promise not to fire him until November 2003.

### 3. The Parol Evidence Rule

In addition, Abel's claim violates the parol evidence rule. "The execution of a contract in writing . . . supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Cal. Civ. Code § 1625. "[E]ven where a contract is not fully integrated, parol evidence is not admissible to supply terms which are inconsistent with the written agreement." *Esbensen v. Userware Internat., Inc.*, 11 Cal. App. 4th 631, 637 n.3 (1992). "[E]vidence of a separate oral agreement may be introduced [only] as to any matter on which the agreement is silent and which is not inconsistent with its written terms." *BMW of North America, Inc. v. New Motor Vehicle Bd.*, 162 Cal. App. 3d 980, 991 n.4 (1984).<sup>5</sup> The Leave of Absence Form to which Abel agreed in March 2001 expressly states that IBM "may, to the extent permitted by law, terminate your leave status and your employment." Hafner Decl. Exs. A, B. IBM's alleged oral promise not to fire Abel until November 2003 directly contradicts this term and is therefore inadmissible.<sup>6</sup> The court thus grants IBM's motion for summary judgment.

#### B. Abel's Motion to Modify the Case Management Order or Extend the Discovery Deadline

Abel moves to (1) push back the trial schedule and all its deadlines by four months or (2) extend the discovery cut-off date. Abel claims that his counsel "inadvertently calendared the [fact discovery] cut-off date for February 7, 200[6]." Mot. Disc. at 6:1. Federal Rule of Civil Procedure

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<sup>5</sup> Abel relies on *Brawthen v. H & R Block Inc.*, 28 Cal. App. 3d 131 (1972) for the proposition that "a generalized termination provision may be subject to a valid oral side agreement" not to fire an employee "except under more narrowly defined 'for good cause' type conditions . . . ." Opp. Mot. Sum. J. at 4:2-5. However, Abel does not claim that IBM fired him without good cause. Instead, he contends that IBM breached an agreement not to fire him under any circumstances. Moreover, in *Brawthen*, the written employment contract at issue "did not expressly contradict the oral agreement." *Brawthen*, 28 Cal. App. 3d at 138. Here, the Leave of Absence Form, which permits IBM to terminate Abel's employment, is squarely at odds with the alleged oral promise not to do so until November 2003.

<sup>6</sup> There is some uncertainty about whether Hafner's alleged representations "preceded or accompanied the execution" of the Leave of Absence Form. Compare Abel Decl. ¶ 7 (Hafner's assurances that "the bridge to retirement would work" occurred "before I accepted the unpaid leave of absence") *with id.* at ¶ 10 (alleging that Hafner told him "not to worry" about the Leave of Absence Form but not specifying when this conversation took place). Nevertheless, even if Hafner's statements came after the parties signed the contract, it is undisputed that Abel executed another Leave of Absence Form in March 2002 that re-instituted "[t]he terms and conditions" of the March 2001 Leave of Absence Form. Mowry Decl. Ex. A. Under the parol evidence rule, this agreement supercedes the terms of any oral agreement on the same subject matter.

1 16(b) states that "schedul[ing orders] shall not be modified except on a showing of good cause."

2 The lynchpin of this analysis is whether the party seeking the modification has been diligent:

3 Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party  
 4 seeking the amendment . . . . *Carelessness is not compatible with a finding of*  
 5 *diligence and offers no reason for a grant of relief.* Although the existence or  
 6 degree of prejudice to the party opposing the modification might supply  
 additional reasons to deny a motion, the focus of the inquiry is upon the moving  
 party's reasons for seeking modification. *If that party was not diligent, the*  
*inquiry should end.*

7 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (internal quotations and  
 8 citations omitted) (emphasis added). Here, the Case Management Order clearly provided that  
 9 December 1, 2005 was the fact discovery cut-off. Even if Abel's counsel believed that the discovery  
 10 cut-off was in February 2006, he did not conduct any discovery for nine months after the Case  
 11 Management Conference. Accordingly, he cannot show the "good cause" necessary to modify the  
 12 Case Management Order. *See Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th  
 13 Cir. 2002) (denying motion to extend discovery where plaintiff's "counsel did not seek to modify  
 14 [scheduling] order until four months after the court issued the order"). The court thus denies Abel's  
 15 motion to the extent it seeks permission to engage in full-blown discovery or continue the trial date.

16 However, as indicated at the February 10, 2006 hearing, the court grants Abel's motion in  
 17 part. Abel claims that Hafner told him that he would memorialize IBM's commitment not to fire him  
 18 in a letter in his personnel file. Abel Decl. ¶ 8. The court ordered IBM to provide Abel with a copy  
 19 of his employment file and a declaration from its custodian of records indicating that he had  
 20 searched for Hafner's letter. The court then gave Abel ten days to reply.

21 IBM has now produced Abel's personnel file and the declaration from its custodian of  
 22 records. Neither party contends that the personnel file contains the Hafner letter. Instead, Abel and  
 23 his counsel have filed declarations questioning whether IBM produced a full copy of the file. *See*  
 24 Docket Nos. 42, 43. Abel also contends that "all managers keep a personal folder in their desk filing  
 25 drawer" that is where Hafner's letter "should be." Abel Supp. Decl. ¶ 8. The court is satisfied based  
 26 on IBM's records custodian's sworn declaration that Hafner's letter is not in Abel's personnel file.  
 27 The court is also unpersuaded by Abel's claim that the letter is likely in Hafner's personal folder.  
 28 Abel's original declaration states that "Hafner said that he would put a letter in *my* personnel folder

1 so that any new manager would be aware of our agreement to bridge my retirement." Abel Decl. ¶ 8  
2 (emphasis added). At no point prior to IBM producing Abel's personnel folder did Abel ever  
3 mention Hafner's personal folder. Because Abel has failed to produce evidence raising a genuine  
4 issue of material fact, the court grants IBM's motion for summary judgment.

### 5 **III. ORDER**

6 For the foregoing reasons, the court grants IBM's motion for summary judgment.

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9 DATED: 3/9/06

/s/ Ronald M. Whyte

10 RONALD M. WHYTE  
11 United States District Judge  
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